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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-409

JOAN K. GORDON and BANK OF NEVADA, Co-Administrators of the Estate of JAMES L. GORDON, aka J. L. GORDON,

Petitioners,

vs.

GERALDINE L. LIGHTENBURGER, individually, GREGORY DALE LIGHTENBURGER, a minor, DENISE SUE LIGHTENBURGER, a minor, MADYLON LESLIE LIGHTENBURGER, a minor, by and through their Guardian ad Litem, GERALDINE L. LIGHTENBURGER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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JOAN K. GORDON and BANK OF NEVADA, Co-Administrators of the Estate of JAMES L. GORDON, aka J. L. GORDON,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

Petitioners Joan K. Gordon and Bank of Nevada, Co-Administrators of the Estate of James L. Gordon, aka J. L. Gordon, hereby petition for a writ of certiorari to review the decision in the Supreme Court of the State of Nevada holding that the aviation guest statute in the State of California was void on the grounds that it violated the equal protection clause of the United States Constitution.

OPINION BELOW

The opinion of the Supreme Court of Nevada is reported in 510 P.2d 865 (1973). The opinion is attached hereto as Appendix A.

JURISDICTION

The opinion sought to be reviewed was rendered on June 6, 1973; and an Order Denying Petition for Rehearing was entered on June 21, 1973. This Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C., §1257(3).

QUESTION PRESENTED FOR REVIEW

Whether the California airplane guest statute, Pub. Util.Code §21406, is void upon the ground that it violates the equal protection clause of the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV to the United States Constitution, Section 1, clause two provides:

> ". . . [N]or shall any State . . . deny to any persons within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

Cal.Pub.Util.Code, §21406:

"A guest riding in or upon any aircraft without giving compensation, or any other person, does not have any right of action for civil damages against the airman flying the aircraft or against any other person otherwise legally liable for the conduct of the airman, on account of personal injury to, or the death of, the guest during such ride, unless the plaintiff in the action establishes that the injury or death resulted from the intoxicated or willful misconduct of the airman."

STATEMENT OF THE CASE

This is a civil action for wrongful death which arose out of the crash of a private plane at Los Angeles International Airport on December 6, 1962. The pilot was James L. Gordon, who was killed in the crash. Petitioners are the administrators of the estate and Gordon's surviving wife. Dale Lightenburger was a guest-passenger, and was also killed in the crash. Respondents are Lightenburger's surviving wife and children.

One of the issues in the case was whether Lightenburger was a guest riding without compensation, or a passenger. Both California and Nevada have airplane guest statutes. The airplane guest statute of California was deemed applicable without objection from either party.

The action was tried in Clark County, Nevada on the basis of California substantive law, and the jury returned a verdict in favor of Defendants (Petitioners herein). The Supreme Court of Nevada reversed. *Lightenburger* v. *Gordon*, 81 Nev. 553, 407 P.2d 728 (1965). The

action was retried; and again the jury returned a defense verdict which was entered on July 10, 1967. The action was again appealed to the Nevada Supreme Court on June 14, 1968. The Supreme Court of Nevada delayed argument until February 14, 1973. After argument, but prior to the time the Court rendered its decision, the Supreme Court of California handed down its decision in *Brown* v. *Merlo*, 8 Cal.3d 855, 106 Cal.Rptr. 388, 506 P.2d 212 (1973), holding that the automobile guest statute of California violated the equal protection guarantees of the California and United States Constitutions. Based upon the reasoning of *Brown* v. *Merlo*, supra, the Supreme Court of Nevada held that the airplane guest statute of California was unconstitutional.[1]

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1. The Supreme Court of Nevada did not indicate whether it was holding the California statute to be in violation of the California Constitution, or the United States Constitution, or both. It is submitted that the Supreme Court of Nevada determined the statute to be violative of the United States Constitution. Research has not disclosed any case in which a court has declared the statute of a sister state as being in violation of the Constitution of that state. It is the duty of every court to guard constitutional rights protected under the United States Constitution, and the action of the Nevada Supreme Court should be deemed in that regard. While the equal protection clause of the California Constitution is generally equivalent to the equal protection clause of the United States Constitution, there is a subtle distinction. The California Constitution, Article I, Section 11, requires that "all laws of a general nature shall have uniform application." *Mental Hygiene Dept. of Cal.* v. *Kirchner*, 380 U.S. 194, 13 L.ed.2d 753, 85 S.Ct. 871. This provision could provide an independent, non-Federal basis of decision with respect to the California automobile guest statute. Because an automobile is a ground vehicle which operates on both public highways which are covered by the statute and on private roads which are not covered by the statute, a number of exceptions have arisen which limit the uniformity of application of the automobile guest statute. This lack of uniformity provides a separate basis of non-Federal jurisdiction under the California Constitution. These exceptions do not exist under the airplane guest statute, and would not provide a separate, non-Federal basis for the decision.

In the alternative, Petitioners would request that the Court remand the case to the Nevada Supreme Court for a determination of whether its decision was based solely upon the equal protection clause of the United States Constitution. *Mental Hygiene Dept. of Cal.* v. *Kirchner*, supra.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Half of the states have enacted automobile guest statutes. Most of the states adopting automobile guest statutes have also enacted airplane guest statutes (Appendix B). The legislatures representing more than a hundred million Americans have deemed that there is a rational basis for the existence of guest statutes.

This Court has considered the question of whether guest statutes violate equal protection provisions of the United States Constitution on only one occasion: *Silver* v. *Silver,* 280 U.S. 117, 74 L.ed. 221, 50 S.Ct. 57 (1929). In that case, the Connecticut automobile guest statute was upheld in the face of an equal protection challenge.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BECKLEY, DELANOY & JEMISON,
Chartered
By /s/ REX A. JEMISON
Attorneys for Petitioners

APPENDIX

APPENDIX A

(KEY)

Geraldine L. LIGHTENBURGER et al.,
Appellants,

v.

Joan K. GORDON et al., Respondents.

No. 5704.

Supreme Court of Nevada.

June 6, 1973.

Rehearing Denied June 21, 1973.

Action for wrongful death of person killed in airplane crash in California. The Eighth Judicial District Court, Clark County, Richard L. Waters, Jr., J., found for defendants, and plaintiffs appealed. The Supreme Court, Thompson, C. J., held that where, subsequent to return of general verdict for defendants, in such action, which was tried on basis of California law and in which recovery was sought on basis of either theory that plaintiff's decedent was passenger for consideration and was killed due to negligence of pilot or on theory that decedent was a guest and was killed by willful misconduct of pilot, California Supreme Court, which had not previously passed upon the issue, effectively nullified such state's airplane guest statute on ground that it denied equal protection, remand for another trial was required.

Reversed and remanded for another trial.

Appeal and Error (Key) 1107

Where, subsequent to return of general verdict for defendants, in action for wrongful death of person killed in airplane crash in California, which was tried on basis of California law and in which recovery was sought on basis of either theory that plaintiff's decedent was passenger for consideraton and was killed due to negligence of pilot or on theory that decent was a guest and was killed by willful misconduct of pilot, California Supreme Court, which had not previously passed upon the issue, effectively nullified such state's airplane guest statute on ground that it denied equal protection, remand for another trial was required. West's Ann.Cal.Pub.Util.Code, § 21406.

Morton Galane, Las Vegas, Robert List, Atty. Gen., Carson City, for appellants.

Beckley, DeLanoy & Jemison, Las Vegas, for respondents.

OPINION

THOMPSON, Chief Justice.

Geraldine Lightenburger for herself, and on behalf of three minor children, commenced this action to recover damages for the wrongful death of her husband, Dale, who was killed when the Cessna 310 in which he was riding crashed and burned at the Los Angeles International Airport on December 6, 1962. The pilot was James L. Gordon who also was killed. The defendants to the action are the executor of his estate and his surviving wife.

The initial trial resulted in a jury verdict for the defendants which this court set aside. Lightenburger v. Gordon, 81 Nev. 553, 407 P.2d 728 (1965). The case was tried once more, and again the jury favored the defendants.

This appeal is from the judgment entered upon the verdict of the second trial. A complete recitation of the facts surrounding the plane crash may be found in our first opinion and will not be repeated here.

Each trial was presented to the court and jury on the basis of California law. The airplane guest statute of that state deprives the heirs of a deceased airplane guest of any recovery unless death resulted from the pilot's willful misconduct or intoxication.[1] The statute thus withdraws from aircraft "guests", that is, passengers who give no compensation for their ride, the protection against negligently inflicted injuries. For this reason, the plaintiffs presented two theories for recovery. First, that the decedent Lightenburger was a passenger for consideration, and was killed by the negligence of the pilot Gordon. Second, that Lightenburger's status was that of a guest, and that he was killed by the willful misconduct of Gordon. Thus, the issues regarding the status of Lightenburger, and the standard of care by which the liability of the pilot was to be determined, were critical issues in the case.

The jury returned a general verdict. Consequently, we do not know the reasoning upon which that result was reached. Perhaps recovery was denied on the ground that Lightenburger was a passenger and pilot negligence was not established; or because Lightenburger was found to be a guest, and the pilot's willful misconduct was not shown; or, because the pilot's conduct, however characterized, did not proximately cause the crash.

---

1. Cal.Pub.Util.Code § 21406. "A guest riding in or upon any aircraft without giving compensation, or any other person, does not have any right of action for civil damages against the airman flying the aircraft or against any other person otherwise legally liable for the conduct of the airman, on account of personal injury to, or the death of, the guest during such ride, unless the plaintiff in the action establishes that the injury or death resulted from the intoxication or willful misconduct of the airman."

On February 20, 1973, the California Supreme Court handed down its decision in Brown v. Merlo, 8 Cal.3d 855, 106 Cal. Rptr. 388, 506 P.2d 212, holding that the automobile guest statute of that state violates the equal protection guarantees of the California and United States Constitutions. The court reasoned that the proffered justifications for that statute—the protection of hospitality and the prevention of collusive lawsuits—did not constitute a rational basis for the differential treatment accorded by the statute's classification scheme. The "protection of hospitality" rationale was found fatally defective since it did not explain why different treatment was accorded automobile guests from all other guests; how the interest in protecting hospitality could rationally justify the withdrawal of legal protection from guests, nor does it take account of the prevalence of liability insurance coverage which effectively undermines any rational connection between the prevention of suits and the protection of hospitality. The "prevention of collusion" rationale was found to be too gross and overinclusive since the statute bars the great majority of valid suits along with fraudulent claims. Id. 106 Cal.Rptr. 388, 506 P.2d at 215.

In voiding, as unconstitutional, the automobile guest statute of that state, the court also effectively nullified the airplane guest statute which was modeled after the automobile provision.[2]

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2. Footnote 5 to that opinion: "California law does contain two other provisions under which non-paying guests are generally deprived of a cause of action for negligence: the 'airplane guest statute' (Pub.Util.Code, § 21406) and the 'motorboat guest statute' (Harb. & Nav.Code, § 661.1), both of which are modeled after the automobile guest statute attacked in the instant case. Although these statutes do place automobile guests on an equal footing with some other guests in California, we cannot discern how automobile, airplane or motorboat guests can rationally be distinguished from all other guests in relation to an asserted state interest in protecting hospitality."

As noted before, the tragedy giving rise to this litigation occurred more than ten years ago. The cause twice has been litigated in this State and once in the federal system against a different defendant, the United States. Lightenburger v. United States, 460 F.2d 391 (9th Cir. 1972). When Brown v. Merlo, supra, was decided, the instant matter had been retried, appealed, briefed, orally argued, and submitted for decision. Consequently, the respondents suggest that the matter should be put to rest notwithstanding that decision. This, we cannot do.

The equal protection question posed by the plaintiff in Brown v. Merlo had never before been directly passed upon by that court. See footnote 4 of that opinion. Consequently, that decision did not work a change in the law of that jurisdiction. Rather, it expressed for the first time the unconstitutionality of the automobile guest law and other guest statutes modeled after it.[3] It is as though the statutes had never been passed. Brandenstein v. Hoke, 101 Cal. 131, 35 P. 562 (1894). In *Brandenstein*, the California Supreme Court quoted directly from Norton v. Shelby County, 118 U.S. 425, 442, 6 S.Ct. 1121, 30 L.Ed. 178 (1886): "An unconstitutional act is not a law. It confers no rights. It imposes no duties. It affords no protection. It creates no office. It is, in legal contemplation, as inoperative as though it had never been passed."

With this concept in mind it is apparent that the judgment below must be set aside and this cause remanded for still another trial. In the light of Brown v. Merlo, the plaintiffs-appellants have the right to seek damages for the alleged negligence of the pilot Gordon without regard to the status of the decedent Dale Lightenburger. Conversely, the defendants-respondents do not have the

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3. Cases involving a change of law after trial court decision and pending appeal are collected in the Annot., 111 A.L.R. 1317.

protection afforded by the airplane guest law which withdraws therefrom "guests," unless death was due to the pilot's willful misconduct or intoxication. This opinion, of course, does not fault either the trial court or counsel for a failure to be clairvoyant.

Reversed and remanded for another trial.

MOWBRAY, GUNDERSON and BATJER, JJ., and GEZELIN, District Judge.

APPENDIX B

State	Guest Statute	Citation
ALABAMA	Automobile	Ala.Code, 1940 (Title 36, §95)
ARKANSAS	Automobile	Statutes, 1947, §75-913-§75-915 (Annotated)
	Airplane	Statutes, 1497, §75-913
CALIFORNIA	Automobile	Vehicle Code, §17158
	Airplane	Pub.Util.Code, §21406
COLORADO	Automobile	Colo.Statutes Annotated, 1953, §13-9-1
DELAWARE	Automobile	Del.Code Annotated, Title 21, §6106
	Airplane	Del.Code Annotated, Title 21, §6106
GEORGIA	Automobile	136 S.E. 96
IDAHO	Automobile	Idaho Code, §§49-1401, 1402
	Airplane	Idaho Code, Title 21-212
ILLINOIS	Automobile	Ill.R.S., Chapter 95-1/2, §10-201
	Airplane	Ill.R.S., Chapter 15-1/2, §22-82
INDIANA	Automobile	Burns Ind. Statutes Annotated, Chapter 3, §9-3-3-1
	Airplane	Burns Ind. Statutes Annotated, Chapter 8, §21-5-1
IOWA	Automobile	Code of Iowa, 1954, §321.494
KANSAS	Automobile	General Statutes of Kansas, §8-122(b)

State	Guest Statute	Citation
MICHIGAN	Automobile	Compiled Laws, 1948; Mason's 1956 Supp., §257.401
	Airplane	Mason's 1956 Supp., §259.180a
MONTANA	Automobile	Rev.Codes of Mont., 1947, §§32-1113-32-1116
NEBRASKA	Automobile	Rev.Statutes of Neb., 1943, §§39-740
	Airplane	Rev.Statutes of Neb., 1943, §3-129.01
NEVADA	Automobile	N.R.S., §41.180
NEW MEXICO	Automobile	N. M. Statutes, 1953, §64-24-1, 2
NORTH DAKOTA	Automobile	Rev.Code, 1943, §§39-1501 to 39-1503
	Airplane	N. D. Century Code Annotated, Title 2-03-14
OHIO	Automobile	Ohio Rev. Code, §4515.02
	Airplane	Page's Ohio Rev. Statutes Annotated, §4561.15-1
OREGON	Automobile & Airplane	Or. Rev. Statutes, §30.115
SOUTH CAROLINA	Automobile	Code of Laws of S.C., 1952, §46-801
	Airplane	Code of Laws of S.C., Chapter 2-21
SOUTH DAKOTA	Automobile	S. D. Compiled Laws, 1967 §32-34-1, 32-34-2
	Airplane	S. D. Compiled Laws, 1967 §50-13-15

State	Guest Statute	Citation
TEXAS	Automobile	Vernon's Texas Statutes, Article 6701 (b)
UTAH	Automobile	Utah Code Annotated, 1953, §§41-9-1, 41-9-2
	Airplane	Utah Code Annotated, 1953, §2-1-33
VIRGINIA	Automobile	Code of Virginia, 1950, §8-646.1
WASHINGTON	Automobile	Rev. Code, §46.08.080, as amended
WYOMING	Automobile	Wyo. Compiled Statutes, 1957, §31-233

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On Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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IN THE

Supreme Court of the United States

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No. 73-409

JOAN K. GORDON and BANK OF NEVADA, Co-Administrators of the Estate of JAMES L. GC[illegible] L. GORDON,

vs.

GERALDINE L. LIGHTENBURGER, individually, GREGORY DALE LIGHTENBURGER, a minor, DENISE SUE LIGHTENBURGER, a minor, MADYLON LESLIE LIGHTENBURGER, a minor, by and through their Guardian *ad Litem*, GERALDINE L. LIGHTENBURGER,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

Respondents initially assert the incompleteness of the opening statement on the first page of the petition that the Supreme Court of the State of Nevada holding was "that the aviation guest statute in the State of California was void on the grounds that it violated the equal protection clause of the United States Constitution." This incompleteness will be corrected in the Statement hereinbelow in order that the record not be distorted to give an impression that a federal question has been properly presented.

Opinions Below.

The petition has omitted the fact that on June 21, 1973, the Supreme Court of Nevada denied a petition for rehearing filed by petitioners. The significance of this omission will become apparent in the Statement hereinbelow, where it will be explained that (1) the petitioners failed to properly raise and have now made an untimely assertion of the federal question sought to be reviewed and (2) the judgment of the Supreme Court of Nevada rested on an adequate non-federal basis.

Jurisdiction.

Respondents do not question the jurisdiction as set forth in the petition, except to assert that (1) the petitioners failed to properly raise and have now made an untimely assertion of the federal question sought to be reviewed and (2) the judgment of the Supreme Court of Nevada rested on an adequate non-federal basis.

Questions Presented.

The petition for certiorari sets out a federal question, but predicates the question upon an incomplete statement of the case, viewed against the opening statement on the first page of the petition with reference to what the Supreme Court of the State of Nevada held, thereby distorting the record below to give an impression that a federal question has been properly presented.

State Constitutional Provisions Involved.

Article I, sections 11 and 21 of the California Constitution guarantee to every person that "(a)ll laws of a general application shall have a uniform operation" and that "(no) citizen, or class of citizens, (shall) be granted privileges or immunities which, upon the same

terms, shall not be granted to all citizens." It is noted that these California state constitutional provisions were expressly stated to be one of the bases for the decision of the Supreme Court of California in *Brown v. Merlo,* 8 Cal.3d 855, 106 Cal.Rptr. 388, 506 P.2d 212 (1973).

Statement of the Case.

The petition for certiorari sets out an incomplete statement of the case which requires correction in the following respects: After the rendition of the decision by the Supreme Court of California in *Brown v. Merlo, supra,* which expressly cited California state constitutional provisions as one of the bases for the decision, respondents filed a "Motion for Leave to Cite Additional Authority Published After Oral Argument," a copy of which is annexed hereto as Appendix A, wherein reference was made to the California state constitutional provisions as one of the bases for the decision. Petitioners filed no opposition to the motion. The Supreme Court of Nevada filed its Order of May 7, 1973, a copy of which is annexed hereto as Appendix B. Thereafter, respondents filed a "Motion for Leave to File Supplemental Brief Based Upon Order Filed May 7, 1973," a copy of which is annexed hereto as Appendix C, wherein reference was again made to the California state constitutional provisions as one of the bases for the decision. Petitioners then filed a "Memorandum of Points and Authorities in Opposition to Appellants' Motion for Leave to File Supplemental Brief Based Upon Order Filed May 7, 1973," a copy of which is annexed hereto as Appendix D, wherein petitioners asserted no federal question, but merely asked for "an end to brief writing and an end to litigation." The Supreme Court of Nevada filed its Order

of May 24, 1973, a copy of which is annexed hereto as Appendix E. Thereafter, on June 6, 1973, the Supreme Court of Nevada rendered its decision and expressly stated (1) "Each trial was presented to the court and jury on the basis of California law" (Page A3, lines 5 to 6, Petition for Certiorari); (2) "On February 20, 1973, the California Supreme Court handed down its decision in *Brown v. Merlo,* 8 Cal.3d 855, 106 Cal.Rptr. 388, 506 P.2d 212, holding that the automobile guest statute of that state violates the equal protection guarantees of the California and United States Constitutions" (Page A4, lines 1 to 6, Petition for Certiorari); (3) "* * * the court also effectively nullified the airplane guest statute which was modeled after the automobile provision." (Page A4, lines 24 to 26, Petition for Certiorari); "* * * we cannot discern how automobile, airplane or motorboat guests can rationally be distinguished from all other guests * * *" (quoting from the California Supreme Court decision, on Page A4, Footnote 2); "* * * the respondents (petitioners herein) suggest that the matter should be put to rest notwithstanding that decision. This, we cannot do." (Page A5, lines 8 to 10, Petition for Certiorari). Thereafter, petitioners filed a "Petition for Rehearing," a copy of which is annexed hereto as Appendix F, which is completely silent with respect to the federal question presented for review in this petition. Respondents filed a "Reply to Petition for Rehearing," a copy of which is annexed hereto as Appendix G, which clearly stated in a pertinent part: "The Supreme Court of Nevada merely recognized that determination by the highest court of a sister state." Rehearing was denied June 21, 1973.

ARGUMENT.

1. The federal question sought to be reviewed was not timely or properly raised, or expressly passed on. The question presented in the petition for certiorari is a complete afterthought, conceived after all other contentions were rejected by the Supreme Court of Nevada.

2. The judgment of the Supreme Court of Nevada rests on an adequate non-federal basis. The Supreme Court of Nevada merely decided that California substantive law was controlling, that the California Supreme Court had in effect nullified the California airplane guest statute and that one of the bases for the decision of the California Supreme Court was the conflict between the California guest statute and the California state constitutional provisions, specifically, Article I, sections 11 and 21 of the California Constitution.

3. The alleged federal question, assuming *arguendo* that it had been timely or properly raised, or expressly passed on, or that it was a predicate for the judgment without regard for a non-federal basis, is not a question of substance, viewed against the thorough analysis of the factors leading the Supreme Court of California to reach its conclusion and the careful effort to distinguish the 44-year-old case relied upon on page 5 of the petition for certioriari, namely, *Silver v. Silver*, 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221 (1929). That distinction is emphatically discussed by the Supreme Court of California in *Brown v. Merlo, supra*, at footnote 4, on pages 217-218 of 506 P.2d, as follows:

> "4. Over 40 years ago, in Silver v. Silver (1929) 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221,

the United States Supreme Court did uphold the constitutionality of a Connecticut automobile guest statute in the face of an equal protection challenge. In Silver, however, the plaintiff had attacked the statute solely on the ground that the distinction drawn between automobile guests and guests in other conveyances was impermissible; in rejecting this argument, the Supreme Court did not consider the reasonableness of the two additional statutory distinctions—between 'guests' and paying passengers and between different categories of automobile guests—which are attacked in the instant case. In addition, because of the focus of the plaintiff's argument, the *Silver* court approached the guest statute simply as one of the many automobile regulatory measures then rapidly coming into existence, and rejected plaintiff's constitutional challenge largely on the basis of the uniqueness of automobiles. That analysis, however, is not adequate to justify the multilevel classification scheme involved in California's guest statute.

"Moreover, unlike the present case, the Connecticut statute reviewed in *Silver* was not set against the background of (1) almost universal liability insurance and (2) such decisions as Rowland v. Christian (1968) 69 Cal.2d 108, 70 Cal. Rptr. 97, 443 P.2d 561, Silva v. Providence Hospital (1939) 14 Cal.2d 762, 97 P. 2d 798, and Emery v. Emery (1955) 45 Cal.2d 421, 289 P. 2d 218. As we explain hereafter, the current factual and legal setting demonstrates the unreasonableness of the guest statute's discriminatory treatment of automobile guests. For all these reasons, the decision in *Silver* does not control the instant case."

Conclusion.

For the foregoing reasons, respondents respectfully urge that the petition for a writ of certiorari should be denied.

Respectfully submitted,

MORTON R. GALANE, ESQ.,

ROBERT F. LIST, ESQ.,

Attorneys for Respondents.

APPENDIX "A."

Motion for Leave to Cite Additional Authority Published After Oral Argument.

In the Supreme Court of the State of Nevada.

Geraldine L. Lightenburger, individually, Gregory Dale Lightenburger, a minor, Denise Sue Lightenburger, a minor, Madylon Leslie Lightenburger, a minor, by and through their Guardian, ad Litem, Geraldine L. Lightenburger, Appellants, vs. Joan K. Gordon and Bank of Nevada, Co-Executors of the Estate of James L. Gordon, a/k/a J. L. Gordon, Respondents. Case No. 5704.

Appellants move the Supreme Court of Nevada for leave to cite the following authority published after the oral argument on March 23, 1973, in 506 P.2d—No. 2: *Brown v. Merlo,* 106 Cal.Rptr. 388, 506 P.2d 212 (1973). The Supreme Court of California declared the California guest statute, as applied to a negligently injured guest, in violation of the equal protection guarantees of the California and United States Constitutions.

Respectfully submitted,

MORTON GALANE, ESQ., and
ROBERT F. LIST, ESQ.

/s/ BY Morton R. Galane
MORTON R. GALANE
1100 First National Bank Building
Las Vegas, Nevada 89101

Attorneys for Appellants

RECEIPT OF COPY of the foregoing "Motion For Leave to Cite Additional Authority Published After Oral Argument" is hereby acknowledged this 25th day of April, 1973.

BECKLEY, DE LANOY & JEMISON, CHARTERED

/s/ BY Rex A. Jemison, Esq.
REX A. JEMISON
1000 First National Bank Building
Las Vegas, Nevada 89101

Attorneys for Respondents

APPENDIX "B."

Order.

In the Supreme Court of the State of Nevada.

Geraldine L. Lightenburger, individually, Gregory Dale Lightenburger, a minor, Denise Sue Lightenburger, a minor, Madylon Leslie Lightenburger, a minor, by and through their Guardian ad Litem, Geraldine L. Lightenburger, Appellants, vs. Joan K. Gordon and Bank of Nevada, Co-Executors of the Estate of James L. Gordon, a/k/a J. L. Gordon, Respondents. No. 5704.

Filed: May 7, 1973.

Pursuant to unopposed motion of appellants seeking leave to cite additional authority published after oral argument, and good cause appearing, it is

ORDERED that appellants are granted leave to cite as additional authority the case of Brown v. Merlo, 506 P.2d 212 (Cal. 1973).

/s/ Batjur, *J.*

cc: Counsel of record

APPENDIX "C."

Appellants' Motion for Leave to File Supplemental Brief Based Upon Order Filed May 7, 1973.

In the Supreme Court of the State of Nevada.

Geraldine L. Lightenburger, individually, Gregory Dale Lightenburger, a minor, Denise Sue Lightenburger, a minor, Madylon Leslie Lightenburger, a minor, by and through their Guardian ad Litem, Geraldine L. Lightenburger, Appellants, vs. Joan K. Gordon and Bank of Nevada, Co-Executors of the Estate of James L. Gordon, a/k/a J. L. Gordon, Respondents. Case No. 5704.

Appellants move the court for leave to file a supplemental brief upon the following two legal issues, based upon the Order filed May 7, 1973, a copy of which is annexed hereto as Exhibit "A", which cites the determination by the Supreme Court of California in *Brown v. Merlo*, 106 Cal.Rptr. 388, 506 P.2d 212 (1973) that the California guest statute, as applied to a negligently injured guest, violates the equal protection guarantees of the California and United States Constitutions:

I.

Specification of Legal Errors No. 2 (Page 3, lines 1-6, of Appellants' Opening Brief), which reads as follows:

> "2. The court committed an error in law occurring at the trial and objected to by the appellants when the court on July 7, 1967 refused to give Instruction P-1, which read: 'You are instructed that the issue of the status of Dale Lightenburger in the airplane, namely, whether he was a passenger for consideration or a guest, is withdrawn from the jury's consideration.' "

II.

The additional legal issue asserted in the additional brief filed by appellants pursuant to the order permitting each party to file an additional brief, (Page 2, lines 5-12, of additional brief):

> "Whether an interpretation by a California appellate court of a California statute, Section 21406 of the California Public Utilities Code, which makes the liability of a pilot or account of the death of an occupant in the aircraft dependent on a determination of the occupant's status (passenger or guest) under California law, was denied full faith and credit by the Nevada District Court in violation of Article IV, Section 1, of the United States Constitution, and the Act of June 25, 1948, c. 646, 62 Stat. 947, 28 U.S.C. §1738 enacted to implement the constitutional provision?"

MORTON GALANE, ESQ., and
ROBERT F. LIST, ESQ.
/s/ BY Morton R. Galane
MORTON R. GALANE
1100 First National Bank Building
Las Vegas, Nevada 89101

Attorneys for Appellants

RECEIPT OF COPY of the foregoing "Appellants' Motion for Leave to File Supplemental Brief Based Upon Order Filed May 7, 1973" is hereby acknowledged this 15th day of May, 1973.

BECKLEY, DE LANOY & JEMISON,
Chartered
/s/ Rex A. Jemison Esq.
REX A. JEMISON
1000 First National Bank Building
Las Vegas, Nevada 89101

Attorneys for Respondents

Order.

In the Supreme Court of the State of Nevada.

Geraldine L. Lightenburger, individually, Gregory Dale Lightenburger, a minor, Denise Sue Lightenburger, a minor, Madylon Leslie Lightenburger, a minor, by and through their Guardian ad Litem, Geraldine L. Lightenburger, Appellants, vs. Joan K. Gordon and Bank of Nevada, Co-Executors of the Estate of James L. Gordon, a/k/a J. L. Gordon, Respondents. No. 5704.

Filed: May 7, 1973.

Pursuant to unopposed motion of appellants seeking leave to cite additional authority published after oral argument, and good cause appearing, it is

ORDERED that appellants are granted leave to cite as additional authority the case of Brown v. Merlo, 506 P.2d 212 (Cal. 1973).

/s/ Batjur, *J.*

cc: Counsel of record

APPENDIX "D."

Memorandum of Points and Authorities in Opposition to Appellants' Motion for Leave to File Supplemental Brief Based Upon Order Filed May 7, 1973.

In the Supreme Court of the State of Nevada.

Geraldine L. Lightenburger, individually, Gregory Dale Lightenburger, a minor, Denise Sue Lightenburger, a minor, Madylon Leslie Lightenburger, a minor, by and through their Guardian ad Litem, Geraldine L. Lightenburger, Appellants, v. Joan K. Gordon and Bank of Nevada, Co-Executors of the Estate of James L. Gordon, a/k/a J. L. Gordon, Respondents. No. 5704.

Received May 23, 1973.

The present action was filed June 18, 1963. The third and last trial was completed on July 10, 1967. Thereafter, appellants filed twelve post-trial motions. On April 15, 1969 this Court vacated oral argument. Four additional briefs have been filed by the parties in addition to the briefs normally allowed on appeal.

It is respectfully submitted that there should be an end to brief writing and an end to litigation.

Respectfully submitted,

BECKLEY, DE LANOY & JEMISON,
Chartered

/s/ By Rex A. Jemison

Attorneys for Respondents
1000 First National Bank Building
Las Vegas, Nevada 89101

CERTIFICATION OF MAILING—N.R.C.P. 5(b)

I hereby certify that on May 22, 1973, I served the within Memorandum of Points and Authorities in Opposition to Appellants' Motion for Leave to File Supplemental Brief Based Upon Order Filed May 7, 1973 on the attorney for Appellants by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada, addressed as follows:

MORTON R. GALANE, ESQ.
1100 First National Bank Building
Las Vegas, Nevada 89101
and
ROBERT F. LIST, ESQ.
Ormsby County Courthouse
Carson City, Nevada

Dated this 22 day of May, 1973.

/s/ Layner Nelson
An employee of BECKLEY, DE LANOY & JEMISON, Chartered

APPENDIX "E."

Order.

In the Supreme Court of the State of Nevada.

Geraldine L. Lightenburger, individually, Gregory Dale Lightenburger, a minor, Denise Sue Litenburger, a minor, Madylon Leslie Lightenburger, a minor, by and through their Guardian ad Litem, Geraldine L. Lightenburger, Appellants. vs. Joan K. Gordon and Bank of Nevada, co-Executors of the Estate of James L. Gordon, a/k/a J. L. Gordon, Respondents. No. 5704.

Filed: May 24, 1973.

Good cause appearing,

Appellants' motion to file an additional supplemental brief is denied.

It is so ORDERED.

/s/ Thompson, *C. J.*

cc: Messrs. Galane, Tingey & Shearing
Messrs. Beckley, De Lanoy & Jemison

APPENDIX "F."

Petition for Rehearing.

In the Supreme Court of the State of Nevada.

Geraldine L. Lightenburger, individually, Gregory Dale Lightenburger, a minor, Denise Sue Lightenburger, a minor, Madylon Leslie Lightenburger, a minor, by and through their Guardian ad Litem, Geraldine L. Lightenburger, Appellants, vs. Joan K. Gordon and Bank of Nevada, Co-Executors of the Estate of James L. Gordon, a/k/a J. L. Gordon, Respondents. No. 5704.

Received June 19, 1973.

COME NOW Respondents and petition the Court for a rehearing upon the following ground: In determining the retroactive effect of *Brown v. Merlo,* 506 P.2d 212 (Cal. 1973), the Court relied upon Nineteenth Century decisions which set forth the "Blackstonian" view which was followed by the United States Supreme Court in *Norton v. Shelby County,* 118 U.S. 425, 6 S. Ct. 1121, 30 L.ed. 178 (1886), wherein the court held that an unconstitutional statute is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed. This was the rule in the Nineteenth Century. However, that concept has undergone a gradual erosion with the decisions in *Great Northern R. Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358, 53 S.Ct. 145, 77 L.ed. 360 (1932) and *Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940). In *Great Northern,* the Court rejected the argument that the Constitution was abridged by the

lower court's refusal to apply its ruling retroactively, holding at page 364 of 287 U.S., at page 148 of 53 S.Ct.:

> "We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, through later overruled, are law none the less for intermediate transactions. Indeed there are cases intimating, too broadly (cf. Tidal Oil Co. v. Flanagan [263 U.S. 444, 44 S.Ct. 197, 68 L.Ed. 382]) that it *must* give them that effect; but never has doubt been expressed that it *may* so treat them if it pleases, whenever injustice or hardship will thereby be averted." [Emphasis by the court.]

Similarly, in *Chicot*, the court asserted that broad statements as to the effect of a determination of unconstitutionality, such as that in *Norton v. Shelby County*, supra, must be taken with qualifications. The court further stated at page 374 of 308 U.S., at page 318 of 60 S.Ct.:

> "The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, —with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its

previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from the numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified."

Whatever vestige of the "Blackstonian" view of absolute retroactivity remained after *Great Northern* and *Chicot* was ultimately laid to rest by the Supreme Court in *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.ed.2d 601 (1965), wherein the court held that "the accepted rule today is that in appropriate cases the court may, in the interest of justice, make the rule prospective". 381 U.S. at 628, 85 S.Ct. at 1737. Although *Linkletter* involved a constitutional issue of criminal procedure, it established that this rule applies to both civil and criminal litigation. *Linkletter v. Walker*, supra.

It is submitted that the Court should grant a rehearing for the purpose of determining whether a claim of "law of the case" constitutes a question of rights claimed to have become vested and whether it is in the interests of justice to make the rule prospective.

Respectfully submitted,

BECKLEY, DE LANOY & JEMISON,
Chartered

/s/ By Rex A. Jemison

Attorneys for Respondents
1000 First National Bank Building
Las Vegas, Nevada 89101

CERTIFICATE OF MAILING

I hereby certify that on June 18, 1973 I served the foregoing Petition for Rehearing by depositing a copy in the United States mails, postpaid, addressed to:

MORTON GALANE, ESQ.
1100 First National Bank Building
Las Vegas, Nevada 89101
and
ROBERT F. LIST, ESQ.
Ormsby County Courthouse
Carson City, Nevada
Attorneys for Appellants

their last known addresses.

/s/ Layna Nelson
An Employee of Beckley, DeLanoy & Jemison, Chartered

APPENDIX "G."

Reply to Petition for Rehearing.

In the Supreme Court of the State of Nevada.

Geraldine L. Lightenburger, individually, Gregory Dale Lightenburger, a minor, Denise Sue Lightenburger, a minor, Madylon Leslie Lightenburger, a minor, by and through their Guardian ad Litem, Geraldine L. Lightenburger, Appellants, vs. Joan K. Gordon and Bank of Nevada, Co-Executors of the Estate of James L. Gordon, a/k/a J. L. Gordon, Respondents. Case No. 5704.

Appellants, pursuant to Rule 34(3) of the Supreme Court Rules, files this their reply to respondents' petition for rehearing. The petition for rehearing fails to perceive that the Supreme Court of California, in *Brown v. Merlo,* 506 P.2d 212 (Cal. 1973), retroactively applied its determination that the California guest statute was unconstitutional. The Supreme Court of Nevada merely recognized that determination by the highest court of a sister state. The point has not been overlooked in the original opinion of the Supreme Court of Nevada. Therefore, the petition for rehearing should be denied.

Respectfully submitted,

MORTON GALANE, ESQ., and
ROBERT F. LIST, ESQ.

/s/ Morton Galane
MORTON GALANE
1100 First National Bank Building
Las Vegas, Nevada 89101

Attorneys for Appellants

RECEIPT OF COPY of the foregoing REPLY TO PETITION FOR REHEARING is hereby acknowledged this 19 day of June, 1973.

BECKLEY, DE LANOY & JEMISON,
Chartered
/s/ BY Rex A. Jemison/wlm
REX A. JEMISON
1000 First National Bank Building
Las Vegas, Nevada 89101
Attorneys for Respondents